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No. 79-1493

# In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS F. PELLON AND VINCENT D. CARILLI, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2aa) is not yet reported. The opinion of the district court (Pet. App. 3a-69a) is reported at 475 F. Supp. 467.

## JURISDICTION

The judgment of the court of appeals was entered on February 15, 1980. The petition for a writ of certiorari was filed on March 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a no-prosecution clause in the cooperation agreement between these petitioners and the government should be construed to include a grant of use and

derivative use immunity, so that evidence obtained as an indirect result of petitioners' cooperation would be inadmissible against them in a prosecution for activities falling outside the agreement.

## STATEMENT

In March 1979, a 12-count indictment was returned in the Southern District of New York charging petitioners and 12 co-defendants with possession with intent to distribute and distribution of cocaine (21 U.S.C. 841(a)(1)), engaging in a continuing criminal enterprise (21 U.S.C. 848), conspiracy to violate the narcotics laws from January 1978 until the filing of the indictment (21 U.S.C. 846), use of the telephone to facilitate a felony (21 U.S.C. 843(b)), and perjury (18 U.S.C. 1623).

On April 6, 1979, petitioners moved alternatively to dismiss the indictment or to suppress all evidence obtained through the use of state court-authorized wiretaps, alleging that an April 1978 government cooperation agreement had immunized them from prosecution and barred use of the wiretap evidence. The district court denied petitioners' motions after a nine-day evidentiary hearing, finding that the agreement neither immunized petitioners nor precluded use of the wiretap evidence (Pet. App. 3a-69a).

On August 22, 1979, petitioners pleaded guilty to Counts One and Two (conspiracy and continuing criminal enterprise) of the indictment, but preserved their right to appeal the denial of their pretrial motions. Petitioner Pellon was fined $100,000 and sentenced to seventeen and one-half years' imprisonment. Petitioner Carilli was sentenced to ten years' imprisonment and ten years' special parole. The court of appeals affirmed (Pet. App. 1a-2aa).



The district court's opinion thoroughly discusses the facts that were adduced at the evidentiary hearing (Pet. App. 3a-69a). In December 1977, Carilli was arrested at Miami International Airport while smuggling cocaine into the country. Shortly thereafter, Howard Rukeyser, a New York attorney representing Carilli, contacted Frederick Marano, a DEA agent in New York, and told him that Carilli might be willing to cooperate with DEA (Tr. 20-21).[1]

Rukeyser, Carilli and Pellon met with several DEA agents on December 15, 1977. After petitioners had been given *Miranda* warnings, they indicated that they could help with the arrest of Ernesto Castrillon, a Colombian cocaine dealer, and the seizure of approximately 500 pounds of cocaine (Tr. 35, 426-429). In exchange, Carilli and Pellon wished Carilli's smuggling charges to be dropped (Tr. 544-545, 644-645).

Rukeyser and the United States Attorney's Office continued negotiations. Rukeyser and Pellon attempted, however, to strike a better bargain with the Customs Bureau (Tr. 709-711). In late January, Carilli and Assistant United States Attorney Jo Ann Harris reached a tentative agreement whereby the government would forgo prosecuting Carilli in the Southern District of New York, as well as help him with respect to his Florida indictment, in exchange for his complete and truthful testimony (Tr. 1306-1307). Harris refused to promise that Carilli's statements would not be used against Pellon (Tr. 1307-1308). Thereafter, Carilli provided some information about his and Pellon's involvement in cocaine dealing.

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[1] "Tr." refers to the transcript of the evidentiary hearing. "Br. A." refers to the appendix attached to the government's brief in the court of appeals.

Carilli did not sign the written agreement, however, and he eventually informed Harris that he was seeking a better bargain in Florida. The agreement was then terminated (Tr. 1309-1313).

In February 1978 Pellon was charged with a narcotics conspiracy in the Southern District of New York based on Carilli's statements to the government. Carilli was named as an uncharged co-conspirator (Tr. 1309; Gov. Exh. 7). On March 7, moreover, the government indicted Pellon for possession and distribution of cocaine, conspiracy, and a passport violation (Tr. 1324; Gov. Exhs. 9, 10).[2] In mid-March, Carilli and Pellon approached AUSA Harris through Jack Attias, a Florida attorney, and again offered their cooperation in apprehending Castrillon (Tr. 1318-1321, 1330-1331). Negotiations resumed, and the government eventually offered to drop Pellon's indictment and refrain from adding Carilli and members of his family as defendants, if Castrillon were arrested with a large amount of cocaine. Otherwise, the government would proceed with petitioners' prosecution (Tr. 1337-1338). The government then learned that Florida authorities had issued arrest warrants for Pellon and Carilli on charges of conspiracy to commit murder (Tr. 1343). While the government immediately broke off negotiations (Tr. 122-123), petitioners denied the allegations and claimed that they had been in Florida to facilitate Castrillon's arrest (Tr. 111-112, 584). In early April, the United States Attorney's Office learned that Florida did not intend to

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[2]The government had additional information concerning petitioners' narcotics activities from an undercover investigation that had been initiated in October 1977 as a result of cooperation by an informant. Rukeyser was eventually informed of this investigation and the information that it had produced. At this time, however, the government still had no idea that petitioners were major drug dealers (Tr. 1316-1317, 308-309, 735-736, 913).



prosecute petitioners, because of insufficient evidence. It was therefore decided to proceed with the cooperation agreement.

On April 1, 1978, Attias sent Rukeyser a draft cooperation agreement, and a meeting with the government was set for April 5 (Tr. 1350-1351). Attias' proposal would have immunized petitioners "for any past or present activities * * * in connection with the violation of the narcotics laws" (Br. A. 4a). This language was unacceptable to the government attorneys, who re-drafted the provision to state only that the government would not bring "any further charges * * * for any violation of the narcotics laws or passport laws * * * *presently known* to the USA and DEA" (Pet. 12; emphasis supplied). The agreement also provided that Pellon would not be prosecuted on the existing federal indictment in New York; that Carilli's cooperation would be made known to the sentencing judge in Florida, where he had pleaded guilty to one count of that federal indictment; and that neither Pellon nor Carilli would be prosecuted for their activities "in their cooperation with the Government" (Pet. 12-14). In exchange, petitioners would cooperate in the investigation of Castrillon and would testify, "if necessary," for the prosecution (Pet. 11-12). If Castrillon were not arrested with an appropriate amount of cocaine, however, the government would be free to prosecute Pellon under the pending New York indictment and bring any additional charges "which [were] not connected with [petitioners'] activities * * * in their cooperation with the Government" (Pet. 14). Finally, the government added a provision that conditioned the entire agreement upon petitioners' "truthful cooperation during all phases of this investigation" (Pet. 17). The final agreement was signed on April 6, 1978.

Castrillon was arrested in New York City on April 19, 1978, with approximately 26 pounds of almost pure cocaine in his possession (Tr. 334-336, 370-374). Prior to Castrillon's trial, petitioners requested formal use immunity with respect to their expected testimony (Tr. 1418, 1426-1434, 1713, 1718). The prosecutors refused to recommend immunity, however, on the ground that the April agreement would not be rewritten and petitioners could assert their Fifth Amendment privilege, in any event, with respect to any potential liabilities that were not covered by the agreement (Tr. 1421, 1426-1434, 1470, 1712-1719). Petitioners subsequently testified, but both asserted their Fifth Amendment privilege on questions beyond the scope of the pending indictment against Pellon (Tr. 1726-1732). Castrillon was convicted and sentenced to nine years' imprisonment.[3]

After Castrillon was sentenced, he cooperated with the United States Attorney's Office and gave information about petitioners' previous and then-ongoing narcotics activities (Tr. 320). This information indicated that, contrary to what the federal authorities had been led to believe, petitioners were the central figures in a massive illegal drug distribution operation. Castrillon's cooperation resulted in a joint federal-state investigation, which included the use of several state ordered wiretaps. Petitioners and certain other persons were arrested on New York State narcotics charges in December 1978, and this federal indictment followed about three months later.

[3]The government assisted Carilli with respect to his federal prosecution in Florida, and he received probation in that case. In August 1978 the government secured a dismissal of the indictment against Pellon in New York.



Among other things, the indictment charged that in early March 1978 Castrillon delivered 200 pounds of cocaine to petitioners in Florida and that they transported 100 pounds of it to Westchester County, New York. They allegedly plotted the murder of Castrillon to avoid paying for the cocaine, which they sold in large amounts during April and May, while they were ostensibly working as government informants (Pet. App. 42a-43a).[4]

## ARGUMENT

1. On April 6, 1978, petitioners entered into an informal no-prosecution agreement that was conditioned upon their "truthful cooperation during all phases of this investigation." At the very moment they signed the agreement, however, petitioners were engaged in a massive narcotics conspiracy, which they concealed from the government, and which obviously would have made that agreement unthinkable if the government had known about it. With characteristic resourcefulness, petitioners nonetheless contend (Pet. 24-25) that their no-prosecution agreement should be construed to include a grant of use and derivative use immunity, so that the fruits of their "cooperation"—including the subsequent cooperation of Castrillon and the information derived therefrom—should be barred from use against them. While petitioners base that contention on the assertion that every no-prosecution agreement is equivalent to a full grant of testimonial immunity under 18 U.S.C. 6002, they cite no authority for that proposition, which the district court correctly found

[4]The state-ordered wiretaps apparently disclosed that Pellon had a narcotics distribution network encompassing several states from Florida to New Jersey and California (Pet. App. 43a).

to be "unprecedented and untenable" (Pet. App. 60a).[5] Moreover, the district court concluded after an extensive evidentiary hearing that this particular agreement neither precluded petitioners' prosecution nor "promise[d] anything approaching use immunity in the usual sense" (Pet. App. 52a). The promise not to prosecute covered only those violations that were known to the government on April 6, 1978, and petitioners do not challenge the court's finding that the government had no knowledge at that time of the broad-based conspiracy charged in this indictment, although it is conceded that some of the overt acts did occur before that date (Pet. App. 46a-48a).

The court also properly found that the agreement did not implicitly promise use immunity. The negotiations leading to the agreement were initiated by petitioners, who bargained for specific benefits in exchange for their information. The agreement itself did not require

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[5]Petitioners' assertion (Pet. 26-32) that a conflict in the circuits exists on this issue is insubstantial. In *United States* v. *Quatermain*, 613 F. 2d 38 (3d Cir. 1980), petition for cert. pending, No. 79-6204, the district court excluded evidence on the ground that the particular informal immunity agreement there should be construed as conferring use immunity. The district court formulated no categorical rule, however, and the Third Circuit did not consider even whether the particular agreement provided use immunity because it reversed on the ground that evidence of an unrelated crime would not be suppressed even if the particular agreement provided for use immunity. Insofar as petitioners contend that the decision below is inconsistent with *United States* v. *Kurzer*, 534 F. 2d 511 (2d Cir. 1976), which involved a formal grant of use immunity under 18 U.S.C. 6002, it is well established that intra-circuit conflicts do not warrant review on certiorari. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners' reliance on *Kurzer* is misplaced in that the Second Circuit upheld the government's position in that case and remanded for further proceedings in the district court.



petitioners to incriminate themselves through testimonial or demonstrative acts, since it required only that they assist the government in arranging Castrillon's arrest.[6] Consequently, petitioners had no obvious need for testimonial immunity, and they received none (Pet. App. 53a-58a). Indeed, petitioners' specific request for formal use immunity during Castrillon's trial indicates that they fully understood the limited scope of their agreement. Finally, petitioners both invoked their Fifth Amendment privilege when asked at Castrillon's trial about events that were beyond the scope of Pellon's prior indictment, again demonstrating their recognition that they had no protection for their wide-ranging narcotics activities, which were unknown to the government (Pet. App. 58a-59a). In sum, the district court had ample basis for its conclusion (Pet. App. 60a-61a):

> These defendants offered their cooperation to the Government voluntarily and with full knowledge of what they were promising and what benefits they would receive. They were not compelled, over their invocation of the Fifth Amendment, to do anything that they did not willingly agree to do. Under these circumstances, the defendants got what they bargained for, and deserve no more than that.[7]

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[6]The agreement required that petitioners testify against Castrillon "if necessary," but it did not require that petitioners incriminate themselves. That fact, which was clear from the agreement, was further elaborated when the government refused petitioners' request for immunity for their testimony and told them they were free to assert the Fifth Amendment privilege if they were concerned about possible inquiries into activities not covered by the agreement (see page 6, *infra*).

[7]The district court also later found that both petitioners had "violated the agreement egregiously" (Tr. Sentencing of Carilli 15-16; Tr. Sentencing of Pellon 19).

2. Petitioners further contend (Pet. 25, 33-34) that the district court's interpretation of the agreement amounts to a holding that petitioners implicitly waived their privilege against self-incrimination by signing the agreement. That argument simply misstates the court's holding. By holding that petitioners had no Fifth Amendment privilege regarding their activities in assisting the government with Castrillon's arrest, the court did not hold that they had waived their Fifth Amendment rights. Instead, the court simply recognized that, to the extent that petitioners were protected from prosecution for the activities involved in the Pellon indictment, as well as for their activities as government agents in setting up Castrillon's arrest,[8] the agreement had removed their risk of incrimination as to those activities, and they had no need to invoke the privilege. A claim of privilege is valid only if a witness's responses would expose him to a real and substantial danger of incrimination. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968).

Petitioners were not in any way held to have waived a valid Fifth Amendment privilege. In fact, they successfully asserted the privilege with respect to those activities for which they were subject to a risk of incrimination.

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[8]As the district court pointed out, it was unclear why a promise of no-prosecution was necessary for petitioners' conduct as undercover government agents, since they would not have had the necessary intent to be guilty of criminal offenses (Pet. App. 54a n.10). Even without the agreement, therefore, petitioners would have had no valid Fifth Amendment claim if asked to testify about those activities.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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